



U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON ENERGY AND COMMERCE

July 8, 2015

To: Members, Subcommittee on Commerce, Manufacturing, and Trade
From: Committee Majority Staff
Re: Hearing on “H.R. 985, Concrete Masonry Products Research, Education, and Promotion Act of 2015.”

I. INTRODUCTION

On Friday, July 10, 2015, at 9:00 a.m. in 2123 Rayburn House Office Building, the Subcommittee on Commerce, Manufacturing, and Trade will hold a hearing on “H.R. 985, Concrete Masonry Products Research, Education, and Promotion Act of 2015.”

II. WITNESSES

First Panel

- Ellen Herbst, Chief Financial Officer and Assistant Secretary for Administration, U.S. Department of Commerce; and
- Franklin Rusco, Director, Natural Resources and Environment-Energy Issues, U.S. Government Accountability Office.

Second Panel

- Major Ogilvie, General Manager, Ready Mix USA, LLC.;
- Kent Waide, President, Ruby Concrete Company; and
- Kate Offringa, President, Vinyl Siding Institute Incorporated.

III. BACKGROUND

A. Overview: Check-off Programs

Check-off programs are commodity research and promotion programs used to support the overall production and sales of a particular commodity or good.¹ They are authorized and established by federal law at the request of an industry and are designed to strengthen the position of a commodity in the marketplace without reference to a specific brand or producer.²

¹ See <http://nationalaglawcenter.org/overview/checkoff/>. See also <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateB&leftNav=ResearchandPromotion&page=ResearchandPromotion>

² *Id.*

Check-off programs are financed by manufacturers or producers of the covered commodity through the payment of a mandatory assessment.³ The assessments are typically charged based on the amount of the product that is sold, produced, or imported by the manufacturer or producer.⁴ These funds are used to support a coordinated program of research, promotion, and consumer education, which is intended to increase domestic demand and consumption of the commodity, and expand opportunities for growth in foreign markets.⁵ Examples of generic promotional outreach supported by check-off programs include “Beef. It’s What’s for Dinner” and “The Incredible Edible Egg.”⁶

Congress originally authorized the use of check-off programs in the 1930s for the generic promotion of agricultural products.⁷ Check-off programs also have been authorized for other commodities outside of the agricultural sector including goods such as propane and heating oil.⁸ While these programs are requested, administered, and funded by the industries themselves, general oversight of the check-off program is provided by the federal agency with related authority or stewardship over production of the covered commodity.⁹ In this oversight capacity, the federal agency traditionally will appoint a board, council, or other type of representative body to help fulfill the goals outlined in the statute authorizing the establishment of the check-off program.¹⁰

In the last 20 years, the Supreme Court has heard three cases challenging the constitutionality of check-off programs on the grounds that they violate the First Amendment.¹¹ The Supreme Court affirmed the constitutionality of check-off programs in those cases holding that generic advertising and promotional activities do not violate a producer’s right to free speech under the First Amendment.¹² Moreover, it held that compulsory assessments collected from producers are permissible to fund generic advertising if they are a part of a broader regulatory scheme to support other educational and promotional activities and are not exclusively used to fund generic

³ Vina, Stephen R. RL32957 “Farm Product ‘Check-off’ Programs: A Constitutional Analysis.” CRS Reports and Analysis. June 9, 2006. Available at: <http://www.crs.gov/pdfloader/RL32957>. (“Vina, 2006)

⁴ *Id.*

⁵ *Id.*

⁶ Becker, Geoffrey S. “Federal Farm Promotion (‘Check-Off’) Programs.” Congressional Research Service. October 20, 2008. Available at: <http://www.crs.gov/pdfloader/95-353>

⁷ *See* Vina, 2006.

⁸ Testimony Before the Subcommittee on Energy, Committee on Energy and National Resources, U.S. Senate. Propane and Heating Oil: Federal Oversight of the Propane Education and Research Council and National Oilheat Research Alliance Should Be Strengthened. September 29, 2010. *See* <http://www.gao.gov/assets/130/125331.pdf>

⁹ *Id.*

¹⁰ *See* Vina, 2006.

¹¹ *See* Becker, 2008. *See also* Legal Information Institute, Cornell University Law School. Available at: https://www.law.cornell.edu/lii/about/about_lii

¹² Supreme Court of the United States. *Glickman, Secretary of Agriculture v. Wileman Brothers & Elliott, Inc. et al.* 95-1184) 521 U.S. 405 (2001). Available at: <https://www.law.cornell.edu/supct/html/95-1184.ZS.html>

advertising.¹³ The Supreme Court also held that check-off advertising is a form of government speech and therefore does not infringe on First Amendment rights.¹⁴

B. Check-off Program Legislative History for Concrete Masonry Products

On April 19, 2013, Representatives Brett Guthrie and Kathy Castor introduced H.R. 1563, the Concrete Masonry Products Research, Education, and Promotion Act of 2013 to establish a check-off program for concrete masonry products. At the conclusion of the 113th Congress, H.R. 1563 had 267 cosponsors. Representatives Guthrie and Castor reintroduced the legislation, now H.R. 985, the Concrete Masonry Products Research, Education, and Promotion Act of 2015, in the 114th Congress on February 20, 2015. It currently has 151 cosponsors.

C. H.R. 985 Section-by-Section

Section 1. Short Title. This Act may be cited as the “Concrete Masonry Products Research, Education, and Promotion Act of 2015.”

Section 2. Findings and Declaration of Policy. Section 2 describes why the concrete masonry products industry plays a significant role in the U.S. economy. It also sets forth the purpose of the Act to establish a program that strengthens the market position and promotes the use of concrete masonry products.

Section 3. Definitions. Section 3 sets forth definitions for terms contained within the Act.

Section 4. Issuance of Orders. Section 4 authorizes the Secretary of the Department of Commerce to issue orders under this Act that are applicable to manufacturers of concrete masonry products. It also sets forth terms that the Secretary must follow in issuing a proposed order, amending a current order, and making orders available for public comment and review.

Section 5. Required Terms in Orders. Section 5 sets forth the specified terms and conditions that an order must contain. This section establishes a Concrete Masonry Products Board, the criteria for board membership, and the powers and duties of the board in carrying out the promotional, research, and informational programs related to concrete masonry products.

Section 6. Assessments. Section 6 requires and authorizes the collection of mandatory assessments paid by manufacturers of concrete masonry products manufactured and marketed in the United States. It also sets forth the collection processes of the assessment and details how the assessments must be disbursed to support research, educational, and promotional activities.

Section 7. Referenda. Section 7 requires the Secretary to conduct a referendum among manufacturers required to pay the assessments to formally adopt an order under this Act. The

¹³ Supreme Court of the United States. *United States et al. v. United Foods, Inc.* (00-276) 533 U.S. 405 (2001). Available at: <https://www.law.cornell.edu/supct/html/00-276.ZS.html>

¹⁴ Supreme Court of the United States. *Johanns, Secretary of Agriculture, et al. v. Livestock Marketing Association et al.* (03-1164) 544 U.S. 550 (2005). Available at: <https://www.law.cornell.edu/supct/html/03-1164.ZS.html>

Secretary will deem the order in effect only if it has been approved by a simple majority of all the votes cast in the referendum by concrete masonry product manufacturers. This section also sets forth the terms of eligibility among manufacturers to participate and cast votes on the referendum.

Section 8. Petition and Review. Section 8 authorizes concrete masonry product manufacturers covered by an order to file a petition challenging the legality of the order. It also authorizes manufacturers to file a petition requesting a modification to the order or an exemption from the order.

Section 9. Enforcement. Section 9 gives U.S. District courts authority to enforce this Act. It also authorizes the U.S. Attorney General to impose civil actions. It establishes civil penalties and orders for violations of the Act of not more than \$5,000 for each violation. It also provides that any remedies for enforcement listed in this Act are in addition to, and not exclusive of, other remedies that may be available.

Section 10. Investigation and Power to Subpoena. Section 10 authorizes the Secretary to conduct investigations, issue subpoenas, and take other actions to determine whether any are engaging in conduct that violates the Act

Section 11. Suspension or Termination. Section 11 gives the Secretary authority to suspend or terminate an order or provision of an order that obstructs or does not effectuate the purpose of the Act. It also gives the Secretary authority to suspend or terminate the collection of assessments under an order and all other activities if it is determined that the order is not approved as a result of a referendum conducted under Section 7.

Section 12. Confidentiality. Section 12 sets forth that nothing in the Act will require the Board to disclose information or records under section 522 of title 5, United States Code.

Section 13. Amendments to Orders. Section 13 establishes that all the provisions of the Act that are applicable to the order will be applicable to any amendment to the order, except Section 8 will not apply to an amendment.

Section 14. Effect on Other Laws. Section 14 establishes that this Act will not affect or preempt any other Federal or State laws authorizing research, education, and promotion relating to concrete masonry products.

Section 15. Regulations. Section 15 authorizes the Secretary to issue regulations that may be necessary under the power vested in the Secretary under this Act to carry out the Act.

Section 16. Limitation on Expenditures for Administrative Expenses. Section 16 prohibits the use of any funds appropriated to carry out the Act to be used for the payment of expenses or expenditures of the Board in administering the order.

IV. ISSUES

The following issues may be examined at the hearing:

- What is the status of the concrete masonry products industry in domestic and foreign markets?
- What potential benefits could be realized under this legislation for the concrete masonry products industry?
- How will the Department of Commerce fulfill its oversight role in the establishment of this check-off program?

V. STAFF CONTACTS

If you have any questions regarding this hearing, please contact Paul Nagle and Olivia Trusty of the Committee staff at (202) 225-2927.